Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, AND JER PARTNERSHIP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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1. Did the Tenth Circuit Court of Appeals err when it failed to consider the extrinsic evidence presented to it by the Petitioner?

2. Did the Tenth Circuit Court of Appeals err when it refused to direct the District Court to consider the Petitioner's contract reformation claim?

LIST OF PARTIES AND RULE 29.1 LISTING

There were no parties to this action below other than those identified in the caption of this Petition. Petitioner Williams Natural Gas Company is a wholly-owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc., that are not wholly-owned by that corporation are as follows:

Apco Argentina, Inc.
Nebraska Energy, L.L.C.
NESP Supply Corporation
Northern Border Intermediate Limited Partnership
Northern Border Partners, L.P.
RESERVECO Inc.
TransNetwork Holding Co.
Tubexpress, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Williams Natural Gas Company ("WNG"), seeks a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Tenth Circuit, which affirmed an order granted by the district court in favor of Respondents.

OPINIONS BELOW

The December 5, 1995, unpublished opinion of the Tenth Circuit is reprinted at Appendix A[1] and may be found at 1995 U.S. App. LEXIS 33,734. The unpublished decision of the United States District Court for the District of Colorado (Nottingham, D.J.), is reprinted at App. B.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on December 5, 1995. App. A. This petition for a writ of certiorari is being docketed in this Court within ninety days from the entry of judgment by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

RELEVANT STATUTE

Pursuant to Rule 14.1(f), WNG has attached a copy of Colo. Rev. Stat. Section 4-2-202 (1992) as App. C.

STATEMENT OF THE CASE

This case arises from the respondents' action seeking declaratory judgment in a contract dispute and WNG's counterclaim seeking reformation of the contracts involved. The district court's jurisdiction was based on diversity of citizenship grounds under 28 U.S.C. §§ 1332(a)(1), 2201(a) (1994). WNG is a Delaware corporation with its principal place

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[1] References to documents reprinted in an Appendix will hereinafter appear in the Petition as "App."

of business in Oklahoma. Talus Properties Limited Partnership is a Texas partnership, with a General Partner that is a South Carolina corporation with a principal place of business in South Carolina and with Limited Partners of a New Jersey corporation with a principal place of business in Florida and an individual who is a resident of Switzerland and a citizen of the United States. Prima Oil and Gas Company is a Colorado corporation with its principal place of business in Colorado. John P. Lockridge is a Colorado citizen. Yuma County Oil Company is a Colorado corporation with its principal place of business in Colorado. JER Partnership is a Colorado partnership whose partners are all Colorado citizens.

Respondents are the sellers, and WNG is the buyer, under three Gas Purchase Contracts (the "Contracts"). Various aspects of the Contracts had been before the district court in four prior proceedings and before the Tenth Circuit in Northwest Central Pipeline Corp. v. JER Partnership, 943 F.2d 1219 (10th Cir. 1991). The Contracts are identical with respect to their provisions concerning the term of WNG's obligation to purchase gas. The Contracts provide, in part, as follows:

> Term
>
> This Contract shall remain in full force and effect from the date hereof and shall extend for a period of twenty (20) years from the date of initial delivery of gas hereunder.
>
> Preferential Right to Purchase and Right of First Refusal
>
> Upon the expiration of the primary term of this Contract, Seller hereby grants to Buyer the preferential

right and the right of first refusal to purchase gas produced from the wells, leases and lands described on Exhibit "A" attached hereto. At least thirty (30) days, but not more than ninety (90) days, before the expiration of this contract, Seller may make a bona fide offer to Buyer to sell that natural gas which may thereafter be produced from such wells, leases and lands. If no offer is made by Seller to Buyer within the time above described, then that natural gas thereafter produced from the wells, leases and lands described on Exhibit "A" will continue to be sold to Buyer under the terms and conditions of this Contract. Thereafter, Seller shall have the right to make a bona fide offer at least thirty (30) days, but not more than ninety (90) days, before the next anniversary date of this Contract and each and every anniversary date thereafter until Seller shall make a bona fide offer to Buyer within the above described time period prior to any succeeding anniversary date.

The parties discovered that they interpreted the quoted language differently in the course of settling claims raised in other litigation, which has since been settled. Respondents filed a declaratory judgment action asking the district court to hold that the Contracts provide Respondents with the power to unilaterally extend WNG's obligation beyond the twenty-year term. WNG opposed that claim and sought a declaration that the Contracts could not be extended beyond the twenty-year term without the consent of WNG or, in the alternative, an equitable reformation of the Contracts to reflect the agreement of the parties that the Contracts could not be extended beyond the twenty-year term without WNG's consent.

Respondents filed a motion for summary judgment contending that the Contracts are unambiguous and that they provide Respondents with the option to unilaterally extend the term. WNG opposed the motion on the same grounds presented here. The district court granted Respondents' motion for summary judgment, holding that the Contracts are unambiguous and that they provide Respondents with a unilateral option to extend. The district court entered a judgment declaring that interpretation of the Contracts and specifically declining to reach WNG's reformation action. App. B at 16. WNG appealed that decision to the Tenth Circuit.

On appeal, the Tenth Circuit found that the Contracts' terms are "plain and unambiguous." App. A at 10. From this finding, the court concluded that "defendant cannot introduce extrinsic evidence to vary or contradict" the Contracts' terms. App. A at 10.

Despite the fact that the Contracts are not fully integrated, the court held that WNG's evidence of consistent additional terms was inadmissible. The court recognized that UCC Section 2-202 (as adopted in Colorado) allows a party to introduce evidence of consistent, additional contract terms. However, the evidence was not allowed because the court erroneously believed that the additional terms would conflict with the Contracts.

Finally, the court disallowed WNG's reformation counterclaim. WNG presented several examples of evidence that supported its request for reformation of the Contracts. However, the court's opinion incorrectly recognized only the evidence that supported the court's ultimate conclusion.

REASONS FOR GRANTING THE WRIT

Summary of Argument

In a matter of great public importance, this Court should grant certiorari in order to limit the negative impact of the Court of Appeals' decision on the clearly established policy goals of the Federal Energy Regulatory Commission ("FERC"). If this decision is allowed to stand, FERC's attempts to introduce competition to the interstate natural gas market will be threatened, and the economic basis on which FERC reorganized the natural gas industry will be thrown into serious question. FERC's inability to meet its competition goals, and the resulting chaos in the interstate natural gas transportation markets, would ultimately cause citizens nationwide to pay higher gas rates without receiving corresponding value in return.

I. THE COURT OF APPEALS' DECISION INVOLVES FEDERAL ISSUES THAT HAVE A SIGNIFICANT IMPACT ON THE INTERSTATE NATURAL GAS GRID.

A. The Decision Below Directly Conflicts With FERC's Policy Determinations in Its Order No. 636, Which Introduced Competition to the Interstate Gas Supply and Transportation Markets.

In its Order No. 636, FERC made a sweeping regulatory reorganization of the interstate natural gas industry that was designed to promote competition among suppliers for both

natural gas and natural gas transportation services.[2] The FERC intended such competition to benefit individual gas consumers and the nation as a whole by ensuring reliable gas supplies at reasonable prices.

When FERC was developing its regulations, it made economic assessments of the impact of reorganization based on the assumption that gas supply contracts entered into by pipelines would terminate after a known time period. The termination of gas supply contracts was required because FERC believed that it would be in the consumers' best interests to take pipelines out of the business of buying and selling gas and limit them to transportation only. "Unbundling" of pipelines' merchant function was necessary to realize FERC's goal of a competitive interstate natural gas grid. To assist a fair and orderly transition to the reorganized industry, FERC permitted pipelines to recover from ratepayers the cost of terminating their gas purchase contracts that were no longer necessary due to the reorganization. FERC assumed that the transition costs associated with terminating the contracts would be limited to reasonable amounts by the terms of the contracts.

FERC's economic assumptions played a key role in the formulation of its policies. The decision of the Tenth Circuit in this case, if followed in other Circuits, would invalidate FERC's careful analysis. With the underlying analysis undermined, the complete restructuring of the massive interstate natural gas

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[2] Pipeline Serv. Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol [hereinafter Order No. 636], 57 Fed. Reg. 13,267, III FERC Stats. & Regs. Preambles ¶ 30,939, order on reh'g, 57 Fed. Reg. 36,128, III FERC Stats. & Regs. Preambles ¶ 30,950, order on reh'g, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (1992).

system would be thrown into question. This Court has the opportunity to stop the potential destruction of FERC's well-planned efforts to restructure the natural gas transportation industry for the benefit of consumers across the nation.

Actions that steer reality away from FERC's projections pose a serious threat to FERC's competitive efforts. The Tenth Circuit's interpretation of the Contracts, when combined with the potential for similar decisions in other Circuits, has just such an effect. In WNG's case, it was assumed that the Contracts would expire in 2002 (a twenty-year term) based on the written terms of the Contracts. The Tenth Circuit's decision causes the Contracts to continue perpetually. There are many contracts that FERC assumed had various remaining terms with some extending as long as 2004.[3] If the Tenth Circuit's decision is allowed to stand, some of these contracts could be interpreted in a manner similar to WNG's Contracts. Such an interpretation would clearly render FERC's initial assumptions about the industry's contracts unreliable and would pose a severe threat to FERC's competitive goals.

Pipeline companies will pass the extra gas costs they pay under such extended contracts to their customers.[4] The resulting threat to competition would be two-fold. First, this

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[3] Presentations of INGAA Panel at Pub. Conference on Pricing Differential Mechanisms, Interstate Natural Gas Ass'n of America, May 26, 1994.

[4] FERC determined that the costs of the pipelines' transition to a competitive market, including the Respondents' excess recovery under the Contracts, should be completely borne by the customers, as long as the pipelines prudently incurred the costs. Order No. 636, III FERC Stats. & Regs. Preambles ¶ 30,939, at 30,457-59 (1992).

would attach to the effected pipelines a stigma as a potential source of future, hidden costs. This would have a negative impact on interstate pipelines' competitive standing in the marketplace. Second, the amounts charged to the pipelines' former and current customers lessen the amount of money that the customers have available to spend on future services. This has the same impact as if a portion of the customers were simply removed from the marketplace because the customers will not be able to purchase their anticipated amount of services.

Overall, the net result of the Tenth Circuit's ruling in this case is to make interstate pipeline companies less competitive with intrastate pipelines and to destroy the basis on which FERC restructured the industry. This result directly contradicts the commendable, stated policy goals of FERC. Such a conflict is clearly a matter of public and federal importance that this Court should review.

B. The Tenth Circuit's Interpretation of the Contracts Creates an Unconscionable Burden on Interstate Commerce.

The pipeline's customers will ultimately bear the costs of the Contracts. In this instance, WNG's local distribution company customers in Kansas and Missouri will pay for the difference between the contract price of the gas and the actual market price for the gas -- approximately a 400% markup. WNG will be little more than a conduit through which the gross overrecovery windfall will pass from the hands of individual consumers and businesses in Kansas and Missouri into the pockets of gas producers in Colorado. Although it may be reasonable to force consumers to pay these costs for a fixed term, it is unreasonable and contrary to public policy to force

them to pay these costs in perpetuity as the Tenth Circuit has ruled. The payment required by the Tenth Circuit is especially egregious when one recalls that the FERC determined that consumers would be best served by an industry restructuring for which those consumers would pay. Allowing the Tenth Circuit's decision to stand will unfairly increase the cost of transition for consumers and will do so for an unlimited term.

Because other interstate pipelines have similar contracts, consumers in other states are potential targets of a comparable, burdensome interstate wealth transfer from consumers in gas-consuming states to producers in gas-producing states. The total impact of such a transfer presents a serious burden on interstate commerce, which this Court should not countenance. By saddling consumers with an unexpected perpetual surcharge, the Tenth Circuit's opinion regarding the Contracts creates a situation that compels this Court's review.

II. IN A MATTER OF GREAT PUBLIC IMPORTANCE, THE TENTH CIRCUIT MISAPPLIED THE APPLICABLE LAW AND HELD THAT WNG MUST PERPETUALLY PURCHASE GAS FROM THE RESPONDENTS AT AMOUNTS IN EXCESS OF 400% OF THE MARKET PRICE.

A. Standard of Review.

Courts must review summary judgment decisions de novo.[5] Thus, the Court should utilize the same legal

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[5] Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 466 n. 10 (1992) (citing United States v. Diebold, Inc., 369 U.S. 654 (1962)); Jensen v. Redevelopment Agency, 998 F.2d 1550, 1555 (10th Cir. 1993).

standards as the district court in evaluating the motion. This Court may affirm the Tenth Circuit's decision only if it finds that there is no genuine issue as to any material fact and that Respondents were entitled to judgment as a matter of law.[6] This Court must view this case in the light most favorable to WNG, the party that opposed the motion.[7] WNG's evidence is to be believed and all justifiable inferences are to be drawn in WNG's favor.[8]

B. The Tenth Circuit Erroneously Determined That the Contracts are Unambiguous.

The Tenth Circuit reviewed the Contracts and concluded that the term provisions are unambiguous. The Tenth Circuit incorrectly concluded that such a finding was necessary if the court was to ignore the disputed issues raised by WNG's extrinsic evidence. The Tenth Circuit's conclusion that the Contracts are unambiguous is an incorrect determination of a question of law and should be reversed.

The existence of an ambiguity in a written contract is a question of law.[9] The meaning of a written contract, however,

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[6] Fed. R. Civ. P. 56(c).

[7] Eastman Kodak, 504 U.S. at 456; Oklahoma Radio Ass'n v. F.D.I.C., 987 F.2d 685, 690 (10th Cir. 1993); Otteson v. United States, 622 F.2d 516, 519 (10th Cir. 1980).

[8] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[9] Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 917 (10th Cir. 1993) (interpreting Colorado law); Colorado Interstate Gas Co. v. Chemco, Inc., 833 P.2d 786, 788 (Colo. Ct. App. 1991), aff'd, 854 P.2d 1232 (Colo. 1993).

is a question of fact to be resolved in the same manner as other factual disputes.[10]

In determining whether the Contracts are ambiguous, this Court must examine the entire contract and not isolate particular phrases or clauses.[11] This Court should construe the provisions of the Contracts in harmony with their ordinary meaning with reference to all other provisions of the Contracts.[12]

This Court should also consider certain extrinsic evidence in determining whether the Contracts are ambiguous. The Court should consider the nature of the transaction,[13] the commercial context of the Contracts, the purpose of the Contracts, and the circumstances surrounding the execution and performance of the Contracts.[14]

> Ambiguity often arises from the application of the contract to the subject matter of the

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[10] Amoco Rocmount, 7 F.3d at 917.

[11] Amoco Rocmount, 7 F.3d at 917; United States Fidelity & Guar. Co. v. Budget Rent-A-Car Sys., Inc., 842 P.2d 208, 213 (Colo. 1992).

[12] Wota v. Blue Cross & Blue Shield, 831 P.2d 1307, 1309 (Colo. 1992).

[13] Amoco Rocmount, 7 F.3d at 917; In re Thomason, 802 P.2d 1189, 1190 (Colo. Ct. App. 1990).

[14] Prenalta Corp. v. Colorado Interstate Gas Co., 944 F.2d 677, 688 (10th Cir. 1991); Evensen v. Pubco Petroleum Corp., 274 F.2d 866, 871 (10th Cir. 1960).

> agreement, and extrinsic evidence is admissible to remove and explain any ambiguity in the contract as applied. Ambiguity easily arises when the contract is applied to its subject matter in changed circumstances. . . . A contract should be interpreted in light of the changed circumstances to accomplish what the parties intended.[15]

The ambiguity in the Contracts arises in part as a result of dramatically changed circumstances. First, at the time the parties negotiated the Contracts they believed that the then-regulated price of natural gas would continue to rise. Next, unlike the time period during which the Contracts were negotiated, the price of natural gas is no longer subject to federal regulation. Finally, FERC's new regulatory scheme has dramatically changed the nature of WNG's business. WNG is now purely a gas transporter and no longer performs a merchant (purchasing and selling gas) function. A reasonable consideration of those circumstances compels the conclusion that the Contracts' provisions concerning the term of WNG's purchase obligation are ambiguous.

1. The Contracts Contain Internally Inconsistent Language.

The parties clearly and uniformly expressed WNG's obligation to perform elsewhere in the Contracts. The lack of any language which can fairly be interpreted as imposing an

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[15] Amoco Prod. Co. v. Western Slope Gas Co., 754 F.2d 303, 309 (10th Cir. 1985) (quoting Pennzoil v. F.E.R.C., 645 F.2d 360, 388 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982)).

obligation on WNG in the preferential right section strongly suggests that the parties intended to impose no such obligation. At a minimum, the lack of any such definitive language raises an ambiguity contrary to the Tenth Circuit's decision.

The Tenth Circuit's reading of the Contracts also ignores the directly conflicting language of the remainder of the Contracts. The term provision of the Contracts provides that they "shall extend for a period of twenty (20) years from the date of initial delivery of gas." That language is not qualified by the possibility of a unilateral extension. The clear and unambiguous meaning of that provision directly contradicts the Tenth Circuit's conclusion that the respondents can unilaterally extend the term of the Contracts beyond twenty years.

Other aspects of the preferential right section raise ambiguities. The title of the provision itself suggests that the parties included it in the Contracts to grant WNG a right, rather than an obligation, to purchase gas beyond the twenty-year term of the Contracts. A right of WNG to extend the term is directly contrary to the Tenth Circuit's conclusion that the respondents obtained a unilateral right to control any extension to the exclusion of WNG. The first sentence of the clause confirms the intent expressed in the title: "Upon the expiration of the primary term of this Contract, [Talus] hereby grants to [WNG] the preferential right and the right of first refusal to purchase gas." (emphasis added). These provisions directly contradict the Tenth Circuit's conclusion and raise fundamental ambiguity inherent in the language of the Contracts.

2. Circumstances External to the Contracts Also Raise Ambiguities.

Even if the language of the Contracts does not raise an ambiguity, a proper consideration of the circumstances surrounding the Contracts, their purpose, and their commercial context demonstrates the ambiguity. The parties executed the Contracts at a time when FERC strictly regulated the price of gas. It was widely believed (including by these parties) that the price of gas would continue upward following deregulation.[16] In this context, the parties apparently did not anticipate what would happen at the end of the twenty-year term if, as turned out to be the case, the price of gas decreased following deregulation. Even more obvious is the fact that the parties could not and did not anticipate that the price under the Contracts would eventually reach more than 400% of the actual market value of the gas. In fact, the language employed by the parties carefully provides for the period after 2002 based on what the parties thought would happen. The same language is ambiguous, however, when viewed in the context of changes in federal regulation and pricing of the underlying product.[17]

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[16] Northwest Cent. Pipeline Corp. v. JER Partnership, 943 F.2d 1219, 1222-23 (10th Cir. 1991).

[17] See City of Wichita v. Southwestern Bell Tel. Co., 24 F.3d 1282, 1287 (10th Cir. 1994) (finding ambiguity based on regulatory changes); Amoco Prod. Co. v. Kansas Power & Light Co., 505 F. Supp. 628, 630 (D. Kan. 1980) (finding ambiguity as the result of regulatory changes in the natural gas industry).

3. The Absurdity of the Contracts' Operation Evidences Their Ambiguity.

Ambiguity can also be based on the fact that a literal reading of the contract will lead to an unreasonable or absurd result.[18] In Western Gas Processors, Ltd. v. Woods Petroleum Corp., the court found that the "unambiguous" definition of a term proffered by the plaintiff was so broad that adoption of that interpretation would lead to an unreasonable result.[19] The court concluded that the term in question was therefore ambiguous.[20] Here the "unambiguous" interpretation urged by the respondents and adopted by the Tenth Circuit would similarly lead to an absurd result. If the Tenth Circuit's decision is affirmed, WNG, its customers, and their residential users will be forced to purchase gas for an indefinite term at a price that currently exceeds the market value of the gas by more than 400%. This grossly overpriced transaction will continue in perpetuity even though the parties clearly and unequivocally provided for a fixed term of twenty years and none of the parties contemplated the possibility of a unilateral, perpetual extension.[21] Such a result is anything but reasonable and demonstrates the ambiguity inherent in the Contracts as well as the significant public importance of this decision.

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[18] See Evensen v. Pubco Petroleum Corp., 274 F.2d 866, 871 (10th Cir. 1960).

[19] 15 F.3d 981, 987 (10th Cir. 1994).

[20] Id.

[21] See discussion of WNG's evidence, infra, at 18-22.

The most appropriate guidance in this matter comes from the Tenth Circuit's prior interpretation of the very Contracts that are the subject of this Petition.[22] The court considered the interpretation of the pricing provisions of the Contracts following a trial on the merits. Both the district court and the Tenth Circuit found that the Contracts are "poorly written" and ambiguous.[23] Now that the contentions of the parties on this question are reversed, the Tenth Circuit has somehow miraculously found clarity where only confusion and uncertainty existed before. That decision is contrary to the law of this case and the clear ruling of the court in Northwest Central.

The Tenth Circuit's prior decision in Northwest Central found ambiguity in a different part of the Contracts. Nonetheless, the court's reasoning should apply with equal force to the preferential right section. The court found that the lengthy provisions concerning the price of gas, while dealing extensively with what would appear to be every possible future contingency, were nonetheless confusing because they were susceptible of two different and mutually exclusive inferences.[24] The court held:

> In short, we refuse to legally preclude the sort of ambiguity created by conflicting inferences that can be drawn from incomplete contract language. Since the pricing provision's language

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[22] Northwest Cent. Pipeline Corp. v. JER Partnership, 943 F.2d 1219 (10th Cir. 1991).

[23] Id. at 1227, 1229.

[24] Id. at 1227.

> is susceptible of more than one reasonable interpretation, we agree with the district court that it is ambiguous.[25]

The court also found ambiguity in the fact that the language of the Contracts is not internally consistent.[26]

The preferential right section of the Contracts compels exactly the same conclusion. The parties failed to anticipate what would happen in the future and therefore failed to provide explicitly for the term of the Contracts where lower prices, deregulation, and industry restructuring intervened. This is exactly the sort of ambiguity the Tenth Circuit found in other provisions of the Contracts. The Tenth Circuit erred in failing to find the same ambiguity here. That ruling is incorrect as a matter of law and should be reversed.

C. The Tenth Circuit Erroneously Refused to Consider WNG's Extrinsic Evidence.

Having incorrectly ruled that the Contracts are unambiguous, the Tenth Circuit refused to consider evidence of substantial disputes regarding material extrinsic evidence concerning the intent of the parties. The court also failed to correctly apply the Colorado version of the UCC. The Tenth Circuit's refusal to consider the factual disputes presented by WNG's extrinsic evidence is reversible error because, if that evidence had been considered, summary judgment would have been precluded.

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[25] Id. (citation omitted).

[26] Id. at 1228-29.

The ambiguity in the Contracts discussed above required that the Tenth Circuit consider extrinsic evidence of the parties' intent.[27] WNG offered a significant amount of extrinsic evidence that raised substantial disputes concerning material facts. The most important evidence of the Respondents' true intent is their assertion of a delayed drilling claim in related litigation. The respondents argued, in writing, that they were entitled to recover for gas that they would have been able to produce during the fixed twenty-year term of the Contracts but for WNG's litigation. That claim is wholly dependent on the fixed termination of the Contracts after twenty years because a perpetual contract would render the claim worthless by permitting the respondents to recover all of the gas on their property.

In addition to the compelling evidence of the delayed drilling claim, WNG presented the district court with reserve estimates that reflected anticipated prices for the gas subject to the Contracts. The estimates were prepared at the respondents' direction. Portions of those estimates projected prices through 2002 at a constant level reflective of the price established by the Contracts. After 2002, prices fluctuate. That fluctuation is consistent only with sales of gas after 2002 under some arrangement other than the Contracts, because the Contracts establish a single price for future production. Also, in November 1981, several months before the execution of the Contracts, WNG and Respondents entered into a Letter Agreement. App. D. That agreement sets forth the key

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[27] E.g., Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 918-19 (10th Cir. 1993); Northwest Cent. Pipeline Corp. v. JER Partnership, 943 F.2d 1219, 1226 (10th Cir. 1991); Colorado Interstate Gas Co. v. Chemco, Inc., 833 P.2d 786, 789 (Colo. Ct. App. 1991), aff'd, 854 P.2d 1232 (Colo. 1993).

elements of the arrangement that eventually became the Contracts. Among other terms, it includes the term of the Contracts as twenty years. The parties had the opportunity in the Letter Agreement to provide for a longer term or for unilateral extensions but did not.

Finally, review of the lengthy litigation history concerning the Contracts reveals the fact that everyone involved has always acted as though the Contracts had a fixed term of twenty years:

1) John Lockridge, one of the principals of Respondents, testified previously that the Contracts covered a term of twenty years.

2) Respondents have argued in briefs that the Contracts provide for a twenty-year term.

3) Respondents' Complaint in one of the prior lawsuits states that the Contracts are "in full force and effect through May 2002" and that they have a "term of 20 years."

4) The district court twice expressly found that the Contracts were effective for a twenty-year term.

5) The Tenth Circuit recited and approved that finding.[28]

That conclusion is inconsistent with the respondents' interpretation and supports WNG's reading of the Contracts.

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[28] Northwest Cent. Pipeline Corp., 943 F.2d at 1221.

While these statements of the parties and the courts' understanding of the Contracts do not specifically address the issue raised in this case, they are circumstantially supportive of WNG's interpretation of the Contracts and inconsistent with Respondents' interpretation. These expressions raise sharp factual disputes when viewed in light of Respondents' allegation that they always interpreted the Contracts as including the unilateral right to extend them beyond twenty years. Those factual disputes preclude summary judgment against WNG.

Even if the Tenth Circuit correctly determined that the Contracts are unambiguous, it failed to consider WNG's evidence regarding additional terms to the Contracts.[29] The extrinsic evidence WNG presented to the Tenth Circuit shows that the parties intended, consistent with the provisions of the Contracts, that the preferential right section would grant the parties the right to mutually extend the Contracts, but would not grant the respondents the unilateral right to extend them. As discussed above, the parties failed to define the key terms used in the preferential right section. Because the district court had previously held that the Contracts are not complete integrations,[30] it should have considered evidence of consistent additional terms – the definition of key phrases. That evidence was disputed and therefore summary judgment was precluded.

The Tenth Circuit's refusal to consider the factual disputes raised by the extrinsic evidence violates Colo. Rev. Stat. Section 4-2-202. That provision changes the common law

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[29] Colo. Rev. Stat. § 4-2-202(b) (1994).

[30] Northwest Cent. Pipeline Corp., 943 F.2d at 1226. The Tenth Circuit recited its earlier finding on integration in this proceeding. App. A at 11.

regarding the admission of parole evidence. Under Section 2-202, "the lack of facial ambiguity in the contract language is basically irrelevant to whether extrinsic evidence ought to be considered by the court . . . ."[31] Regardless of whether the Contracts are ambiguous, the Tenth Circuit should have considered WNG's evidence concerning the circumstances surrounding the Contracts and the parties' conduct during performance.

Because the Contracts are ambiguous and are not complete integrations, the Tenth Circuit had the obligation to consider extrinsic evidence of the parties' intent. If the Tenth Circuit had considered the extrinsic evidence, it would have been compelled to reverse the district court's summary judgment in favor of Respondents. In failing to do so, the court committed reversible error.

The Tenth Circuit also erroneously refused to consider WNG's evidence of additional terms because the court ruled that the terms were not consistent with the rest of the Contracts. A review of the Contracts and WNG's proffered interpretation, however, makes it clear that WNG's interpretation is consistent with the language of the Contracts.

WNG's interpretation of the Contracts gives effect to every provision of the Contracts, and the Tenth Circuit, therefore, should have adopted this interpretation. WNG contends that the Contracts give the parties the power to continue the purchasing relationship after the conclusion of the twenty-year term only if WNG agrees. This interpretation gives

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[31] Amoco Prod. Co. v. Western Slope Gas Co., 754 F.2d 303, 308 (10th Cir. 1985) (interpreting Colorado law).

meaning to the grant to WNG of a preferential right to purchase gas. It also gives full effect to the parties' agreement to a term of twenty years. Further, it gives effect to the second and third sentences of the preferential rights section:

> At least thirty (30) days, but not more than ninety (90) days, before the expiration of this contract, [Talus] may make a bona fide offer to [WNG] to sell that natural gas which may thereafter be produced from such wells, leases and lands. If no offer is made by [Talus] to [WNG] within the time above described, then that natural gas thereafter produced from the wells, leases and lands described on Exhibit "A" will continue to be sold to [WNG] under the terms and conditions of this Contract.

Under WNG's interpretation of the Contracts, the respondents are empowered to make an offer to WNG during the sixty-day period ending thirty days before the expiration of the Contracts. If they choose not to make an offer, the Contracts will continue during the remaining thirty days, subject to all of the terms and conditions of the Contracts. Those terms and conditions include the immediately preceding paragraph stating that the Contracts extend only until twenty years after first production. At the end of the twenty-year term, the Contracts would terminate. Not only the evidence of the parties' intent but also the language of the Contracts read in light of the well-established rules of construction compels this conclusion. The Tenth Circuit should have considered WNG's evidence concerning consistent additional terms.

D. The Tenth Circuit Erroneously Failed to Direct the District Court to Consider WNG's Reformation Claim.

WNG's counterclaim stated a cause of action for reformation. Despite the parties' arguments on the issue and the proper framing of the issue in the pleadings, the district court concluded that the respondents are empowered to unilaterally obligate WNG to purchase gas after the end of the twenty-year term and stated, "[b]ased on that conclusion, I need not reach the parties' arguments concerning reformation of the contracts." App. B at 16. That conclusion is incorrect as a matter of law, and the Tenth Circuit's failure to direct the district court to consider WNG's claim for reformation is reversible error.[32]

Reformation is an equitable remedy available to correct a mistake in drafting when the final expression of the parties' agreement does not express their true intent.[33] The mistake may be unilateral if the other party knows of it.[34]

The record before the Tenth Circuit established factual disputes with respect to the elements of WNG's reformation action. The 1981 Letter Agreement is one expression of the

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[32] The Tenth Circuit even admitted that it was confused by the reformation claim. App. A at 14. That confusion is apparent from the substance of the court's conclusion.

[33] See Segelke v. Kilmer, 360 P.2d 423, 426 (Colo. 1961); Boyles Bros. Drilling Co. v. Orion Indus., Ltd., 761 P.2d 278, 281 (Colo. Ct. App. 1988).

[34] American Casualty Co. v. Glaskin, 805 F. Supp. 866, 873 (D. Colo. 1992); In re Manzo, 659 P.2d 669, 672 (Colo. 1983).

parties' agreement that predates the Contracts. App. D. The Letter Agreement clearly sets forth a term of twenty years for WNG's purchase obligation. The parties did not agree that the respondents would retain a unilateral right to extend the obligation beyond twenty years. The testimony of Robert Berney, the person who executed the Letter Agreement and the Contracts for WNG, confirms the expression set forth in the Letter Agreement. App. E. Mr. Berney testified that the parties agreed to a straight twenty-year term. App. E. Thereafter, the parties all acted as though the Contracts would last for only twenty years. The parties and the courts made statements that support that conclusion. Respondents employed a party to create reserve studies that are predicated on a twenty-year term. Counsel for the respondents calculated damages on a basis consistent solely with a twenty-year term, and the principals of the respondents adopted the claim. Respondents asserted their claims up to the time that the parties settled their prior disputes. Parole evidence is admissible to establish a claim for reformation.[35] All of this admissible evidence raised factual disputes concerning the elements of WNG's reformation action and therefore precluded summary judgment.

Contrary to the Tenth Circuit's assertions, WNG's reformation claim does not negate the other language in the Contracts. The reformation of the Contracts would merely cause them to operate in the manner originally intended by the parties. As reformed, the Contracts would simply last for the agreed-upon twenty-year term and would provide the parties with the option to extend the Contracts for a longer period. As

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[35] Chilson v. Reed, 389 P.2d 87, 89 (Colo. 1964); Boyles Bros., 761 P.2d at 282.

reformed, the Contracts would retain their original character rather than have their original terms negated.

The district court erred when it concluded that it need not reach the reformation action.[36] The action was appealed to the Tenth Circuit and the record established substantial disputes concerning material facts. The conclusion that the Contracts unambiguously provide as the district court held did not relieve the district court or the Tenth Circuit of the burden of resolving the claim. Instead, resolution of the reformation claim is required because the courts interpreted the Contracts adversely to WNG. Logically, the courts could have avoided WNG's reformation claim only if they had interpreted the Contracts in the manner urged by WNG. The Tenth Circuit's failure to direct the district court to consider the reformation action is reversible error.

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[36] The Tenth Circuit conceded as much when it relied on dicta from a prior decision that permits the appellate court to affirm a decision on grounds not considered by the lower court. App. A at 12-13.

CONCLUSION

The impact of the Tenth Circuit's decision is a matter of great importance to the interstate natural gas industry in the United States, and this Court should issue the requested writ. On review, this Court will be compelled to conclude that the Tenth Circuit's actions were erroneous as a matter of law.

Respectfully submitted,

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March 4, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Filed
United States
Court of Appeals
Tenth Circuit
Dec. 05, 1995
Patrick Fisher,
Clerk

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, JER PARTNERSHIP,	)	
Plaintiffs-Counter-Defendants-Appellees,	)	
v.	)	No.95-1056
WILLIAMS NATURAL GAS COMPANY,	)	(D.C. No. 94-N-251) (D. Colo.)
Defendant-Counter-Claimant-Appellant.	)	

ORDER AND JUDGMENT*

Before TACHA and BARRETT, Circuit Judges, and BROWN,** Senior District Judge.

**Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This case requires us to interpret another portion of three long-term natural gas purchase contracts that were in dispute in Northwest Central Pipeline Corp. v. JER Partnership, 943 F.2d 1219 (10th Cir. 1991). In 1982, defendant pipeline company entered into "take-or-pay" agreements with Yuma County Oil Company, JER Partnership, and a collection of entities known as the Lockridge Group, respectively, to purchase gas from wells in Yuma County, Colorado. Id. at 1221. At issue in Northwest Central Pipeline were the provisions concerning defendant's right to "market out" of the contracts and the price to be paid upon deregulation of the gas subject to the contracts. Id.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

At issue in the present appeal is the meaning and effect of the following provisions:

> 21. Term
>
> This Contract shall remain in full force and effect from the date hereof and shall extend for a period of twenty (20) years from the date of initial delivery of gas hereunder.
>
> 22. Preferential Right to Purchase and Right of First Refusal
>
> Upon the expiration of the primary term of this Contract, Seller hereby grants to Buyer the preferential right and the right of first refusal to purchase gas produced from the wells, leases and lands described on Exhibit "A" attached hereto. At least thirty (30) days, but not more than ninety (90) days, before the expiration of this Contract, Seller may make a bona fide offer to Buyer to sell that natural gas which may thereafter be produced from such wells, leases, and lands. If no offer is made by Seller to Buyer within the time above described, then that natural gas thereafter produced from the wells, leases and lands described on Exhibit "A" will continue to be sold to Buyer under the terms and conditions of this Contract. Thereafter, Seller shall have the right to make a bona fide offer at least thirty (30) days, but not more than ninety (90) days, before the next

anniversary date of this Contract and each and every anniversary date thereafter until Seller shall make a bona fide offer to Buyer within the above described time period prior to any succeeding anniversary date.

If Buyer rejects Seller's offer and subsequently a third party accepts an offer by Seller to sell the gas subject to this Contract, then Seller, before selling such gas to a third party, must promptly present the offer accepted by the third party to Buyer, together with the name and address of such third party. Seller shall also promptly deliver to Buyer the written offer or contract, if any, agreed to by Seller and the third party. Buyer shall thereupon have an option for a period of ten (10) days after receipt of said notice to purchase this gas by accepting such offer. Should said ten (10) days extend beyond the termination date of this Contract, Seller shall continue to sell gas to Buyer under the terms and conditions of this Contract, until the ten (10) days granted to Buyer to exercise his option shall have expired. If Buyer refuses to accept this offer, then Seller is free to sell the natural gas to the third Party that had accepted Seller's offer.

Appellants' App. at 70-71.[1]

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[1] Appellant's Appendix contains a copy of the entire contract between the Lockridge Group, as Sellers, and defendant's predecessor, Cities Service Gas Company, as Buyer. The other two contracts are virtually identical,

Plaintiffs contend that the contract language is not ambiguous and that, pursuant to the plain language, once the twenty-year primary term expires, plaintiffs must continue to sell, and defendant must continue to buy, gas under the same terms and conditions that they bought and sold gas during the primary term, unless plaintiffs offer to sell the gas to defendant at a different price. The district court agreed with plaintiffs as to the interpretation of the contracts and entered summary judgment in plaintiffs' favor. The court declined to address the parties' arguments concerning reformation of the contracts.

On appeal, defendant argues that the contract language is ambiguous, that defendant should be able to introduce extrinsic evidence of the parties' intent to resolve the ambiguity, and that this evidence creates a genuine issue of material fact as to whether, once the twenty-year term expires, defendant is obligated to buy the gas at the primary-term price, absent an offer by the respective sellers to sell the gas at a different price. Defendant further contends that, even if the contracts are not ambiguous, the district court's interpretation is wrong. Also, defendant maintains that it should be able to introduce its extrinsic evidence because the parties did not intend the contracts to be completely integrated. Finally, defendant argues that the district court erred in not reaching its claim for reformation of the contracts.

We review the district court's grant of summary judgment de novo, applying the same standards as the district court under Fed. R. Civ. P. 56(c). Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793, 796 (10th Cir. 1995). "Summary

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except that the provisions at issue here are found in ¶¶ 20 and 21, rather than ¶¶ 21 and 22, of the contract with Yuma County Oil Company.

judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. (quotations omitted).

Whether a contractual provision is ambiguous is a question of law, which we review de novo. Northwest Cent. Pipeline, 943 F.2d at 1226. "To ascertain whether a provision is ambiguous, the court must examine and construe the language in harmony with the plain, popular, and generally accepted meaning of the words employed and with reference to all provisions of the document." Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 917 (10th Cir. 1993)(quotation omitted), cert. denied, 114 S. Ct. 1057 (1994).

> The intent of the parties must be determined from the language of the contract itself, although a court may consider extrinsic evidence bearing upon the meaning of the written terms, such as evidence of local usage and the circumstances surrounding the making of the contract. Extrinsic evidence of intent is not admissible until the contract has been judged to be ambiguous.

Id. (quotations and citation omitted). "A dispute between the parties as to the meaning of a particular provision does not itself render the provision ambiguous." Id.

The relevant provisions here are plain and unambiguous. The primary term of each of the contracts is twenty years. Once the primary term expires, the contracts will remain in effect

under the same terms and conditions, unless, during the allotted time periods, the respective plaintiffs offer to sell defendant the gas under different terms and conditions. Because the relevant provisions are unambiguous, defendant cannot introduce extrinsic evidence to vary or contradict their terms. Northwest Cent. Pipeline, 943 F.2d at 1226.

Nor is defendant's extrinsic evidence admissible on the ground that the contracts are not fully integrated. Under Colorado law, the terms of a final written agreement may be "explained or supplemented . . . [b]y evidence of consistent additional terms" if the court finds that the parties did not intend the written agreement to be fully integrated. Colo. Rev. Stat. § 4-2-202(b). In Northwest Central Pipeline, 943 F.2d at 1226, we upheld the district court's determination that the parties did not intend the contracts at issue to be fully integrated.

The extrinsic evidence that defendant seeks to introduce here, however, is not evidence of consistent additional terms. Under the plain language of the contracts, defendant continues to be obligated to purchase gas from plaintiffs after the expiration of the primary term unless plaintiffs offer defendant a new price for the gas, which defendant rejects. Defendant, however, wants to introduce extrinsic evidence that it contends establishes that defendant has no obligation to purchase gas from plaintiffs after the expiration of the primary term. Because the evidence would vary, rather than supplement, the written terms, it is not admissible under the guise of Colo. Rev. Stat. § 4-2-202(b).

Finally, we address defendant's counterclaim for reformation of the contracts. Defendant contends that the district court erred in failing to consider its reformation claim

before entering summary judgment in plaintiffs' favor. "We are free to affirm a district court decision on any ground for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir. 1994)(quotations omitted).

"'Reformation may be appropriate when a writing does not reflect the true intention of the parties. See Chilson v. Reed, 389 P.2d 87, 89-90 (Colo. 1964). "'Reformation may be a proper remedy even though the mistake is not mutual. If one of the parties mistakenly believes that the writing is a correct integration of that to which he had expressed his assent and the other party knows that it is not, reformation may be decreed.'" American Casualty Co. v. Glaskin, 805 F. Supp. 866, 873 (D. Colo. 1992)(quoting 3 Corbin on Contracts § 614 (1960)). In a suit for reformation, parole evidence is admissible to establish the parties' true intent. Chilson, 389 P.2d at 89.

Defendant's arguments on reformation are not entirely clear. Defendant appears to argue that the purchase agreements should be reformed because the parties were mutually mistaken in believing that the price of natural gas would continue to rise in the future, even after deregulation. Based on this mistaken belief, the parties executed contracts that had the effect, in a declining market, of binding defendant beyond the expiration of the primary term to a contract price that exceeded the market price for gas. Defendant apparently maintains that, had the parties taken into account the possibility of falling prices, they would have given defendant an option to terminate the contract at the conclusion of the primary term, rather than provide that the contracts would remain in effect under the same terms and

conditions unless sellers offer defendant a different--presumably higher--price for the gas.

Defendant's reformation claim is fatally flawed in several respects. First, the evidence does not give rise to any inference of mutual mistake. The provisions at issue originated with defendant and became part of the final contracts without any discussion by the parties. Nothing suggests that plaintiffs failed to consider the possibility of future declining prices when they executed the respective contracts. To the contrary, the contracts work to plaintiffs' advantage in a declining market. Nor is there any evidence that plaintiffs knew at the time they executed the contracts that defendant's assent to the contracts was based on its mistaken belief that future gas prices would not fall.

Further, the testimony from defendant's own witness casts doubt on defendant's present argument that it failed to consider that prices might fall in the future. Jim Killerain, who negotiated the contracts on behalf of defendant, testified that the language of the relevant provisions accurately reflected defendant's intent, so long as defendant also had a unilateral right to market out of the contracts and the other pricing provisions operated as defendant interpreted them. Appellee's Supplemental App. at 42. Defendant's dissatisfaction with the relevant provisions, therefore, appears to spring not from its alleged failure to anticipate that future gas prices might fall, but from the effects of this court's rulings in Northwest Central Pipeline concerning the contracts' market out and pricing provisions.

Finally, we reject defendant's arguments that the 1981 Letter Agreement, which the parties executed before the

contracts, reflects the parties' true intent and that the contracts should be reformed in accordance with the Letter Agreement. The Letter Agreement provides only for a term of twenty years and does not contemplate that the contracts may continue thereafter. The plain language of the contracts, however, provides for a continuation of the contracts beyond the primary twenty-year term, under specified terms and conditions. To reform the contracts to the terms of the Letter Agreement would be to negate entirely any language about extending the contracts beyond the primary term. Even defendant concedes that this would not reflect the parties' true intent. See Reply Br. for Appellant at 13 ("[Defendant] actually argues that the parties agreed to a twenty-year term which could be extended only under certain limited conditions based on the consent of all parties."). Under the circumstances, the district court properly entered summary judgment in plaintiffs' favor on all claims.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 251

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, and JER PARTNERSHIP,

Plaintiffs,

v.

WILLIAMS NATURAL GAS COMPANY,

Defendant.

Filed
United States
District Court
Denver, Colo.
Jan. 16, 1995
James R. Manspeaker,
Clerk

ORDER AND MEMORANDUM OF DECISION

This is a contract dispute. Plaintiffs seek a declaratory judgment establishing defendant's obligation to continue to purchase natural gas following the conclusion of the primary term of the parties' gas purchase contracts. Defendant contends that it has an option to continue purchasing natural gas, rather than an obligation. The facts underlying this litigation are set forth in my prior Order and Memorandum of Decision filed October 28, 1993, which involved the consolidation of civil action numbers 92 N 612 and 92 N 2137.[1] Familiarity with that

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[1] Related disputes involving the same gas purchase contracts were resolved in Northwest Central Pipeline Corporation v. Mesa Petroleum Company, 643 F. Supp. 280 (D. Colo. 1986), and Northwest Central Pipeline

Order is assumed, and the facts will not be repeated here. The matter is now before the court on "Plaintiffs' Motion for Summary Judgment" filed October 11, 1994. Jurisdiction is based on 28 U.S.C.A. § 1332 (West 1993).

FACTS

In 1982, Defendant Williams Natural Gas Company ("Williams") entered into substantially identical gas purchase contracts with Plaintiffs Talus Properties Limited Partnership, Prima Oil and Gas Company, John P. Lockridge, Yuma County Oil Company, and JER Partnership [hereinafter collectively referred to as the "sellers"]. (See App. to Br. in Supp. of Pls.' Mot. for Summ. J., Apps. 1-3 [relevant excerpted provisions] [filed Oct. 11, 1994] [hereinafter "Pls.' App."]; see also Def.'s Br. in Opp'n to Pls.' Mot. for Summ. J., Ex. G [Lockridge contract] [filed Oct. 31, 1994] [hereinafter "Def.'s Br."].) The contractual provisions in dispute are sections 20 and 21 of the "Yuma contract," and sections 21 and 22 of the "JER and Lockridge contracts." (Pls.' App., Apps. 1-3.) Those provisions concern the term of the contracts and the defendant's right of first refusal.

Section 20 of the Yuma contract and section 21 of the Lockridge contract pertain to the term of the contracts and provide as follows:

> This Contract shall remain in full force and effect from the date hereof and shall extend for a period of twenty (20) years from the date of initial delivery of gas hereunder.

Corporation v. JER Partnership, 943 F.2d 1219 (10th Cir. 1991).

(Pls.' App., Apps. 1-2 ¶ 21 [JER and Lockridge contract excerpts], App. 3 ¶ 20 [Yuma contract excerpt].) Section 21 of the Yuma contract and section 22 of the JER and Lockridge contracts, which are the focus of this dispute, are titled "Preferential Right to Purchase and Right of First Refusal" and state in part:

> *Upon the expiration of the primary term of this Contract,* Seller hereby grants to Buyer the preferential right and the right of first refusal to purchase gas .... At least thirty (30) days, but not more than ninety (90) days, before the expiration of this Contract, Seller may make a bona fide offer to Buyer to sell that natural gas which may thereafter be produced .... *If no offer is made by Seller to Buyer within the time above described, then that natural gas thereafter produced . . . will continue to be sold to buyer under the terms and conditions of this Contract.* Thereafter, Seller shall have the right to make a bona fide offer at least thirty days, but not more than ninety (90) days, before the next anniversary date of this Contract and each and every anniversary date thereafter until Seller shall make a bona fide offer to Buyer within the above described time period prior to any succeeding anniversary date.
>
> If Buyer rejects Seller's offer and subsequently a third party accepts an offer by Seller to sell the gas subject to this Contract, then Seller, before selling such gas to a third party, must promptly present the offer accepted

> by the third party to Buyer .... Buyer shall thereupon have an option for a period of ten (10) days after the receipt of said notice to purchase this gas by accepting such offer. Should said ten (10) days extend beyond the termination date of this contract, Seller shall continue to sell gas to Buyer under the terms and conditions of this contract, until the ten (10) days granted to Buyer to exercise his option shall have expired. If Buyer refuses to accept this offer, then Seller is free to sell the natural gas to the third party that had accepted Seller's offer.

(Pls.' App., Apps. 1-2 ¶ 22 [JER and Lockridge contract excerpts], App. 3 ¶ 21 [Yuma contract excerpt] [emphasis added].)

Williams agrees that the preferential right to purchase provision would allow the contracts to continue beyond the primary twenty-year term; however, it argues that the only event that could trigger such continuation is its decision to exercise its right of first refusal. (Br. in Supp. of Pls.' Mot. for Summ. J., Statement of Undisputed Material Facts ¶ 7 [filed Oct. 11, 1994] [hereinafter "Pls.' Br."]; see Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶ 7.) Williams argues that the provision is ambiguous, and that the sellers' representatives previously expressed an intention contrary to that which is asserted in this dispute. (Pls.' Br., Statement of Undisputed Material Facts ¶¶ 4-5; see Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶¶ 4-5.) In contrast, the sellers maintain that they are obligated to continue to sell and Williams is obligated to continue to purchase gas after the

primary term in the event that the sellers fail to make a bona fide offer to defendant or a third party after expiration of the primary term. (Pls.' Br. at 6.)

Prior to executing the gas purchase contracts, Williams submitted drafts of the relevant provisions to the sellers, and the language of those sections remained unchanged in the parties' final executed contracts. (Pls.' Br., Statement of Undisputed Material Facts ¶¶ 1-2; admitted at Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶¶ 1-2.) Defendant concedes that the parties had no conversations or negotiations concerning the language of the applicable sections. (Pls.' Br., Statement of Undisputed Material Facts ¶ 3; admitted at Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶ 3.)

ANALYSIS

1. Legal Standard

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where there is "no genuine issue as to any material fact and the ... moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 321, 106 S. Ct. 2548, 2552 (1986); Thrifty Rent-A-Car Sys., Inc. v. Brown Flight Rental One Corp., 24 F.3d 1190, 1194 (10th Cir. 1994). Pleadings and documentary evidence must be construed in favor of the party opposing the motion. Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 796 (10th Cir. 1993).

When parties move for summary judgment on an issue on which they would not bear the burden of persuasion at trial, their burden of production may be satisfied by demonstrating an absence of evidence in the record to support the nonmoving party's case. Celotex Corp., 477 U.S. at 321, 106 S. Ct. at 2552. Once the moving parties have met their initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. Id.; see Thrifty Rent-A-Car Sys., Inc., 24 F.3d at 1194. A triable issue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429 (10th Cir. 1990). If the nonmoving party cannot muster sufficient evidence to establish a triable issue of fact, a trial would be useless and the moving parties are entitled to summary judgment as a matter of law. Anderson, 477 U.S. at 250, 106 S. Ct. at 2511.

2. Interpretation of the Gas Purchase Contracts

The sole issue presented in this dispute involves the interpretation of the gas purchase contracts. The interpretation of a written contract and the determination of whether a contract term is ambiguous are questions of law. Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1514 (D. Colo. 1992), aff'd, 13 F.3d 366 (10th Cir. 1993); Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 374 (Colo. 1990). Absent a statement of contrary intent or the presence of an ambiguity, the court must enforce the terms of a contract according to their plain and ordinary meaning. See Omnibank Parker Road, N.A. v. Employers Ins. of Wausau, 961 F.2d 1521, 1523 (10th Cir. 1992); Heller v. Fire Ins. Exch., 800 P.2d 1006, 1009 (Colo. 1990); In re May, 756 P.2d 362, 369 (Colo.

1988). To ascertain the meaning of a contract, an examination of the entire instrument is appropriate. See, e.g., Stegall v. Little Johnson Assocs., Ltd., 996 F.2d 1043 (10th Cir. 993).

Plaintiffs' position is that "based upon the clear and unambiguous language of the contracts, [after] the primary 20-year term of the contracts, Plaintiffs are obligated to continue to sell and [Williams] is obligated to continue to purchase gas under the terms and conditions of the contracts if no bona fide offer to sell natural gas that is thereafter produced from the wells, leases and lands described on Exhibit A to the contracts is made by Plaintiffs to defendant within the specified time period." (Pls.' Br. at 6-7.) The sellers argue that the commercial circumstances surrounding the execution of the gas purchase contracts bolster their position based on the fact that "at the time the Contract[s were] signed, "Williams 'was aggressively pursuing' natural gas supplies to satisfy their customers['] needs, and they were competing for those contracts in an environment where prices appeared to be rising and where most people in the industry expected the prices to continue to rise.'" (Pls.' Reply Br. at 10 [filed Nov. 14, 1994].)

Defendant challenges plaintiffs' position based upon the sellers' purported contradictory statements of intent. First, defendant argues that plaintiffs' attorney sent a letter to Williams' attorney outlining certain claims plaintiffs were asserting in a prior litigation involving the same gas purchase contracts. (Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶ 4, Ex. B.) That letter contained statements and damage schedules that, according to defendant, reflected plaintiffs' understanding that the contracts expired in 2002, or twenty years after they commenced. Further, defendant argues that Plaintiff Talus Properties Limited Partnership

commissioned a reserve study for the wells that assumed the contracts would last for a period of twenty years. (Id., Ex. F.) Moreover, defendant offers a series of documents, including prior court decisions, as parol evidence that the contracts expire at the end of their twenty-year term. (Def.'s Br. at 8.) In those prior matters, however, the meaning of sections 21 and 22 of the contracts (the "preferential right to purchase") were not at issue.

Parol evidence is not admissible for purposes of creating an ambiguity. See Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1194 (9th Cir. 1986). Contractual terms are not rendered ambiguous merely because the parties subsequently urge diverse interpretations. See Stichting Mayflower Recreational Fonds v. Newpark Resources, Inc., 903 F.2d 741, 749 (10th Cir. 1990). Rather, a contract is ambiguous where the text of an agreement reasonably allows for varying interpretations, and a court will not "torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity ...." See Wards Co., Inc. v. Stamford Ridgeway Assocs., 761 F.2d 117, 120 (2d Cir. 1985).

In this case, the parties' mere disagreement with respect to the controlling contract language does not establish the existence of an ambiguity. See Kuta v. Joint Dist. No. 50(J), 799 P.2d 379, 382 (Colo. 1990). The primary term of the gas purchase contracts is clearly established as twenty years. (See Pls.' App., Apps. 1-3.) Upon expiration of that term, the rights of the parties are unambiguously set forth in paragraphs 21 and 22 of the contracts. (Id.) During the "secondary term" of the contracts, plaintiffs obtain the right to make an offer to defendant. Plaintiffs may also make an offer to sell gas to a third party, in which case defendant receives a right of first

refusal on that offer. If the sellers make no such offer to defendant during the time periods allotted in the contracts, then the contract establishes that "the natural gas thereafter produced...will continue to be sold to buyer under the terms and conditions of this Contract." (Id.) Contrary to defendant's contention, I find that, as a matter of law, the provision at issue is not susceptible to any other meaning.

Twenty years is simply the primary term of the lease. Upon expiration of the primary term, the lease does not terminate. Rather, the parties' rights and obligations are altered by the terms and conditions set forth in the contracts' "preferential right to purchase" provision. Under no circumstance does that provision grant defendant a blanket "option" to continue with the contracts. Had defendant wanted an option, it presumably would have known how to draft that language. In fact, the contract explicitly provides defendant an option in the second paragraph of the preferential right to purchase provision, which gives Williams the option to accept or reject an offer that has been accepted by a third party. That option does not mean that, in the absence of a third party's acceptance, the contract terminates. On the contrary, the contract continues unless an offer is made to a third party, which defendant rejects when given the opportunity to accept the same. Moreover, the provision discusses the sellers' continuing right to make a bona fide offer to defendant during a specific thirty-to ninety-day period each year. This continuing right only exists upon expiration of the primary term of the contract. If the contract terminated at the end of the twenty-year primary term, it would render the sellers' annual right to make such a bona fide offer meaningless. Further, defendant's reliance on the title of the relevant provision, i.e., "preferential right to purchase," also fails to create the existence of an

ambiguity, particularly in light of paragraphs 19(d) and 20(d) of the contracts which provide that "the headings of various sections of this Contract are for convenience only and are not to be considered as interpreting any provision of this Contract." (Def.'s Br., Ex. G at 20.) Accordingly, defendant is obligated under the unambiguous language of the contracts to continue to purchase gas past the primary term of the contract in accordance with the terms and conditions of the contracts. Based on that conclusion, I need not reach the parties' arguments concerning reformation of the contracts.

3. Conclusion

Based on the foregoing, it is therefore

ORDERED that plaintiffs' motion for summary judgment is GRANTED. All other motions are DENIED as moot.

The clerk shall enter judgment declaring that, under paragraphs 21 and 22 of the respective contracts, plaintiffs are obliged to sell and defendant is obliged to purchase (consistent with all other terms and conditions of the contracts) the natural gas produced from wells and acreage committed to the contracts, at the conclusion of the primary terms of the contracts, if no offer is made by plaintiffs to defendant.

Dated this 16 day of January, 1995.

BY THE COURT:

"s/ _____"
EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 251

CERTIFICATE OF MAILING

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on January 16, 1995, was mailed to the following on January 17, 1995:

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Magistrate Judge Bruce D. Pringle

JAMES R. MANSPEAKER,
CLERK

By "s/_____"
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 251

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, AND JER PARTNERSHIP,

Plaintiffs,

v.

WILLIAMS NATURAL GAS COMPANY,

Defendant.

Filed
United States
District Court
Denver, Colo.
Jan. 21, 1995
James R. Manspeaker,
Clerk

JUDGMENT

PURSUANT to and in accordance with the Order And Memorandum Of Decision entered by the Honorable Edward W. Nottingham on January 16, 1995, it is

ORDERED that plaintiffs' motion for summary judgment is granted. Under paragraphs 21 and 22 of the respective contracts, plaintiffs are obliged to sell and defendant is obliged to purchase (consistent with all other terms and conditions of the contracts) the natural gas produced from wells and acreage committed to the contracts, at the conclusion of the

primary terms of the contracts, if no offer is made by plaintiffs to defendant. It is

FURTHER ORDERED that each party shall bear its own costs.

DATED at Denver, Colorado, this 21 day of January, 1995.

BY THE COURT:

"s/ "
Edward W. Nottingham, Judge
United States District Court

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

"s/ "
By:
Stephen P. Ehrlich,
Chief Deputy Clerk

94 N 251
Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 251

CERTIFICATE OF MAILING

I hereby certify that a copy of the Judgment entered on January 21, 1995, was mailed to the following on January 23, 1995:

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The Williams Companies, Inc.
Post Office Box 2400
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Attorneys for Defendant

Magistrate Judge Bruce D. Pringle

JAMES R. MANSPEAKER,
CLERK

By "s/ "
Deputy Clerk

4-2-202. Final written expression - parol or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein, may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) By course of dealing or usage of trade (section 4-1-205) or by course of performance (section 4-2-208); and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Source: L.65, P. 1303, § 1; C.R.S. 1963, § 155-2-202.

Cross reference: For the course of performance or practical construction, see § 4-2-208.

OFFICIAL COMMENT

1. This section definitely rejects:

(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.

2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

CITIES SERVICE GAS COMPANY
ENERGY CENTER ONE-DENVER, COLORADO
PHONE (303) 629-1926

November 23, 1981

John Lockridge et al
1444 Wazee, Suite 218
Denver, CO 80202

Bonny Gathering
1444 Wazee, Suite 216
Denver, CO 80202

Re: Bonny Reservoir Area, Yuma County, Colorado

Gentlemen:

John Lockridge et al (Lockridge) now owns and may subsequently acquire interests in certain wells and acreage in the Bonny Reservoir Area of Yuma County (Area of Interest) outlined on the map attached hereto as Attachment "A." Lockridge has six (6) existing wells and intends to drill 25 additional wells in the Area of Interest by January 1, 1982.

Bonny Gathering (Bonny) and Cities Service Gas Company (Cities) are finalizing the terms of a Gathering and Dehydration Agreement similar in form to that agreement between Yuma Gathering System and Cities Service Gas Company. Under the proposed agreement, Bonny will gather and dehydrate gas volumes from the Area of Interest and deliver same to Cities at an approximate location of Section 16, Township 1 South, Range 42 West, Yuma County, Colorado.

Cities will reimburse Bonny for such gathering and dehydration services at a gathering charge per Mmbtu based on a fifteen percent (15%) rate of return on Bonny's investment. The initial rate will be $1.19 per Mmbtu with redeterminations each six months thereafter. Bonny expects to make first delivery to Cities no later than April, 1982.

The parties agree to enter into a twenty year term Gas Purchase Contract (Contract) covering the existing gas wells within the Area of Interest on a timely basis prior to commencement of pipeline operations. The parties additionally agree to amend said Contract to add additional gas wells as developed by Lockridge within the Area of Interest. The Contract will be consistent with our standard form previously furnished to the parties; briefly, providing for takes at 95% of deliverability, tight formation price, and compression to be paid by the producer.

This Letter Agreement shall remain in effect during the term of the Contract and shall be binding upon and inured to the benefit of the successors and assigns of the parties hereto.

Very truly yours,

CITIES SERVICE GAS
COMPANY

By "s/ _____ "
Robert E. Berney,
Vice-President

Accepted and agreed to as of the date hereof.

BONNY COMPANY
GATHERING

_____ By "s/ _____ "
Witness J. C. de Graffenried

JOHN P. LOCKRIDGE

_____ By "s/ _____ "
Witness John P. Lockridge

PRIMA ENERGY CORPORATION

_____ By "s/ _____ "
Witness Richard H. Lewis, President

CARLYLE PETROLEUM, INC.

_____ By "s/ _____ "
Witness John O. McCutcheon, Chairman

ALPAR RESOURCES
INC.

_____ By "s/ _____ " Witness
Jack M. Allen, President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL & GAS COMPANY, YUMA COUNTY OIL COMPANY and JER PARTNERSHIP,	)	
Plaintiffs,	)	
vs.	)	Case No. 94-N-251
WILLIAMS NATURAL GAS COMPANY,	)	
Defendant.	)	

DEPOSITION OF ROBERT E. BERNEY, taken on behalf of the Plaintiffs, on Tuesday, the 19th day of April, 1994, pursuant to the Federal Rules of Civil Procedure, at the law offices of Conner & Winters, 2400 First National Tower, Tulsa, Oklahoma, before Frank L. Peterson, a Certified Shorthand Reporter in and for the State of Oklahoma.

[p. 13]

Q. If you would look at Section 22, Mr. Berney, I would like to ask you some questions about it. Do you see in the first line where it says, "Upon the expiration of the primary term"?

A. Yes, sir.

Q. What does that mean to you, "primary term"?

A. Well, I don't know what the word "primary" means. In Section 21 we set out the term of the contract was 20 years, period.

Q. Tell me, if you will, what your understanding is, then, of how Section 22 operates in this contract.

A. Well, the intent of it was at the end of the 20-year term of the contract, Cities Service Gas Company would have the option to strike a new deal. In other words, an option to strike a new deal covering any future deliveries after the expiration of the contract.

Q. So you say it was the intent of Section 22 was that at the end of the 20-year term, Cities Service would have the option to strike a new deal.

A. Yes, get together with the other parties and strike a new deal.

[p. 16]

Q. What is there that's confusing about it, to you?

A. First, in a separate paragraph, which is Paragraph 21, that expresses our intent, just like we put out in our Letter of Intent, this is a 20-year deal. At the end of the 20-year deal it's over unless we strike a new deal. There is no question about what the intent of the parties were, that this was a 20-year deal. We agreed upon that when they needed a piece of paper to take someplace, didn't have time to wait on the contracts, so we summarized our intent very clearly. That's what I call

a Letter of Intent or Letter of Understanding that we made with these parties before we entered into these contracts.

[p. 35]

Q. Is there anything in that language that is confusing or unclear to you?

A. Yes, it conflicts with the rest of the contract, Paragraph 21, which is a flat 20-year term, which was our deal with these people.

Q. Why are you confused about the sentence I just read you when you say it conflicts with Paragraph 21? We just established that 22 clearly operates after the original primary term of the contract has expired. What is the conflict?

A. The parties haven't agreed upon anything after the expiration of the 20-year term.

[pp. 35-36]

Q. When it says, "If no offer is made by seller to buyer within the time above described, then the natural gas thereafter produced from the wells, leases and lands described on Exhibit A will continue to be sold to buyer under the terms and conditions of this contract." Doesn't that mean to you that at the expiration of the primary term and the seller doesn't come and make an offer, that the gas is continued to be sold and purchased under the terms and conditions of the contract?

A. Unless buyer doesn't want to purchase the gas.

Q. Where does it say that?

A. We are talking this first contract ends after 20 years. That was our deal with the Lockridge Group as set out in the Letter of Intent, as set out in the calculations, the costs of service. There is no question, taking all these agreements together, that there's something lacking in this provision. But since the term of the contract is over and you are saying the buyer has no rights or no option, I am saying he does have an option, that was the intent of the --

Q. What is missing from this paragraph, Mr. Berney, to reflect that intent you just described to me? You said something is missing from it, what is missing?

A. Obviously, what is missing is buyer's right to renegotiate the deal at the end of 20-year term if the parties want to continue the contract.

Supreme Court, U.S.
FILED
MAY 7 1996
CLERK

(2)

No. 95-1758

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, AND JER PARTNERSHIP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20pp

RULE 29.1 LIST OF CORPORATIONS AND SUBSIDIARIES

Respondent Prima Oil and Gas Company is a wholly owned subsidiary of Prima Energy Corporation. Respondent Yuma County Oil Company has no parent company and no subsidiaries.

Respondent Talus Properties Limited Partnership is a limited partnership and not a corporation within the scope of Rule 29.1. Respondent JER Partnership is a partnership and not a corporation within the scope of Rule 29.1. Respondent John P. Lockridge is an individual.

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Appendix C
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No. 95-1758

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, AND JER PARTNERSHIP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Talus Properties Limited Partnership, Prima Oil and Gas Company, John P. Lockridge, Yuma County Oil Company, and JER Partnership, file this opposition to the Petition of Williams Natural Gas Company ("WNG") for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

This case presents no constitutional issues and no federal statutory interpretation questions are involved. This is a diversity case involving the interpretation of one clause of three identical Contracts in which the district court ruled on summary judgment that the provision in question was unambiguous. Having so ruled, the district court interpreted the unambiguous language of the Contracts as a matter of law. A panel of the United States Court of Appeals for the Tenth Circuit, without oral argument, unanimously affirmed the district court's summary judgment ruling in an unpublished opinion. There is no split in the circuits, nor is one likely. And, despite Petitioner's unfounded claims to the contrary, there is no compelling public policy reason for this Court to review the judgment of the Tenth Circuit. Accordingly, the Petition for Writ of Certiorari should be denied.

RESPONSE TO PETITIONER'S ARGUMENT

Petitioner propounds two arguments in support of its Petition for Writ of Certiorari:

(1) an unfounded attempt to attach precedential and policy significance to the decision below that is totally lacking;[1] and

(2) a rehash of Petitioner's substantive arguments unanimously rejected by a panel of the Tenth Circuit.[2]

---

[1] Petition for Writ of Certiorari at 6-10.

[2] *Id.* at 10-26. In accordance with Rule 15.2, Respondents object to Petitioner's characterization of the law as applied by the Tenth Circuit, and to Petitioner's characterization of references in prior judicial proceedings to the primary term of the contracts as supporting Petitioner's position. *See* Petition for Writ of Certiorari at 19-21. The Petitioner also mischaracterizes the law in its claim relating to the absence of ambiguity in the contract language, and in Petitioner's claim relating to the Tenth Circuit's refusal to consider Petitioner's reformation arguments. *See* Petition for Writ of Certiorari at 11-18 and 24-26, respectively.

For the reasons given by the Tenth Circuit, that court did not err in refusing to consider the extrinsic evidence proffered by Petitioner; nor did the Tenth Circuit err in addressing and rejecting Petitioner's reformation claim. The remainder of this brief will respond to Petitioner's policy argument. Respondents reserve the right to further respond to Petitioner's substantive arguments on the merits if the writ of certiorari is granted.

The one issue raised in the Petition that might be relevant to whether this Court should grant the requested writ is whether the decision of the Tenth Circuit threatens to undermine the natural gas pipeline industry restructuring initiative of the Federal Energy Regulatory Commission ("FERC") in Order No. 636.[3]

Contrary to Petitioner's claim, the decision below does not threaten the fabric of restructuring; nor does the decision of the Tenth Circuit have the precedential potential to undermine the economic assumptions on which the restructuring initiative of the FERC is founded.

During calendar year 1995, 18,706 million Mcf of natural gas was produced domestically.[4] Under the contracts at issue in this case, approximately 1.7 million Mcf of gas was sold during

---

[3] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol [hereinafter "Order No. 636"], 57 Fed. Reg. 13267 (April 16, 1992), III FERC Stats. & Regs. Preambles ¶ 30,939 (April 8, 1992), *reh'g granted and denied in part,* Order No. 636-A, 57 Fed. Reg. 36128 (August 12, 1992), III FERC Stats. & Regs. Preambles ¶ 30,950 (August 3, 1992), *order on reh'g,* Order No. 636-B, 57 Fed. Reg. 57911 (Dec. 8, 1992), 61 FERC ¶ 61,272 (1992).

[4] Department of Energy, Energy Information Administration *Monthly Energy Review,* March 1996, Table 4.1, column 8. The term "Mcf" is a volumetric unit of measurement equal to one thousand cubic feet.

this same period.[5] Therefore, the gas sold under these Contracts comprises less than one ten-thousandth of the nation's domestic natural gas supply. In dollar terms, the comparison is equally profound: the wellhead cost of the gas sold under these Contracts (approximately $11.6 million)[6] is less than four ten-thousandths of the $29.7 billion aggregate wellhead cost of domestic natural gas purchased during the same period.[7] These figures demonstrate that the quantity of natural gas sold under these Contracts is so minuscule, in the context of the national market, that the pricing of the natural gas under these Contracts has no significant impact on the structure of the national natural gas industry. Thus, Petitioner's claim that the Tenth Circuit's decision represents a threat to the economic assumptions on which FERC based its restructuring orders is unfounded.

In implicit recognition of the minuscule direct impact of these Contracts on the national market for natural gas, Petitioner suggests the precedential effect of the Tenth Circuit's decision could portend greater indirect economic consequences.[8] Petitioner's contention is unfounded for three reasons. First, by the Tenth Circuit's own rules, the unpublished decision below is not intended to have precedential effect.[9] Second, the

---

[5] Affidavit of Floyd Trujillo, ¶5 and Affidavit of Joel Rothman, ¶¶4 and 5 (Appendices B and C, respectively). Petitioner's argument concerning the alleged macroeconomic significance of the decision below to natural gas markets is made for the first time before this Court. Accordingly, the record below is devoid of factual matter relating to the relative insignificance of the quantity of natural gas sold under the contracts involved in this case, necessitating Respondents' reliance on the cited affidavits.

[6] *Id.*

[7] *See* Department of Energy, Energy Information Administration *Monthly Energy Review,* March 1996, Table 4.1 and 9.11. Derived by multiplying the 1995 average domestic natural gas wellhead price of $1.59 per Mcf (Table 9.11, column 2) by the 1995 total domestic dry gas production of 18,706 million Mcf (Table 4.1, column 8).

[8] Petition for Writ of Certiorari at 7.

[9] *See In re Citation of Unpublished Opinions/Orders and Judgments,* 151 F.R.D. 470 (10th Cir. Nov. 29, 1993).

bulk of the costs associated with the changes in the natural gas industry occasioned by deregulation were incurred prior to Order No. 636,[10] evidencing the fact that most interstate pipelines, including Petitioner, have successfully renegotiated or bought-out the great majority of their long-term gas supply contracts. As a result, the likelihood is small that the issues presented in this case would arise in numerous other cases in other circuits so as to potentially influence the structure of the national natural gas market. Third, the lower courts' rulings in this case are extremely fact-specific, turning on the peculiar language of these Contracts. The contract language at issue in this case appears to have been unique to Petitioner's contracts, and the three Contracts involved in this case are the only contracts of Petitioner still in effect that contain the language in question.[11] Therefore, there is no significant risk that the Tenth Circuit's decision in this case will be followed in other circuits in a manner that would warrant intervention by this Court at this time.

Nor is there merit to Petitioner's contention that the continuation of its contractual obligations for an indefinite (but not unlimited) period of time threatens the viability of the FERC's restructuring policies.[12] As Petitioner indicated,[13] in Order No. 636,[14] and in subsequent orders implementing restructuring on

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[10] *Compare* Order No. 636 at p. 30,643 (interstate pipelines filed to recover nearly 10 billion dollars under FERC Orders No. 500 and 528) *with* Appendix B to Brief of the Federal Energy Regulatory Commission, *United Distribution Companies v. FERC,* No. 92-1485 (D.C. Cir. June 6, 1995) (interstate pipelines had filed to recover about $1.355 billion as GSR costs under Order No. 636 as of May 10, 1995). *See also* Graph at Appendix A, p. A-2, indicating decline in pipeline filings to recover Order No. 636 restructuring costs following peak in the 4th Quarter of 1993.

[11] *Williams Natural Gas Co.,* 73 FERC ¶ 61,367, at p. 62,155 (Dec. 22, 1995).

[12] Petition for Writ of Certiorari at 8.

[13] *Id.* at 8, n.4.

[14] Order No. 636, III FERC Stats. & Regs. Preambles ¶ 30,939, at 30,457-59 (1992).

individual pipelines,[15] the FERC has established mechanisms whereby interstate pipelines are able to recover the cost of restructuring from their customers. These costs include Gas Supply Realignment ("GSR") costs associated with long-term gas supply contracts, such as those involved in this case, that are no longer required by the pipeline in light of restructuring.[16] Thus, the FERC has already taken steps to safeguard against the economic consequences conjured by Petitioner.

Moreover, Petitioner grossly overstates the potential for these consequences to continue indefinitely. In the order approving Petitioner's restructuring, the FERC approved pass-through by Petitioner to its customers of Petitioner's GSR costs under a Price Differential Mechanism.[17] Essentially this mechanism allows Petitioner to resell, at spot-market prices, the above-market priced gas Petitioner is obligated to buy under these Contracts. Initially the FERC approved Petitioner's Price Differential Mechanism for a period of two years.[18] More recently, at Petitioner's request, the FERC extended this mechanism for an additional two years, until October 1997.[19] There is no assurance, or even a likelihood, that the FERC will extend Petitioner's Price Differential Mechanism beyond October 1997, however. Thus, the long-term consequences to the FERC's restructuring program raised by Petitioner are speculative at best. Moreover, the FERC is quite able to prevent an indefinite perpetuation of the consequences about which Petitioner complains. Thus, these

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[15] *E.g., Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,124 (1993) (approving recovery of "pricing differential" costs); *Williams Natural Gas Co.*, 64 FERC ¶ 61,165, at 62,426-27 (1993).

[16] *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,124 (1993).

[17] *Williams Natural Gas Co.*, 64 FERC ¶ 61,165, at 62,426-27 (1993).

[18] *Williams Natural Gas Co.*, 62 FERC ¶ 61,261, at 62,762 (1993) (approving *Texas Eastern* style pricing differential mechanism for WNG); *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,125 (1993) (imposing initial two-year limit on price differential mechanism).

[19] *Williams Natural Gas Co.*, 71 FERC ¶ 61,335 (June 14, 1995), *order granting and denying reh'g*, 73 FERC ¶ 61,367 (Dec. 22, 1995).

Contracts do not threaten the long-term future of the FERC's restructuring initiative.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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May 7, 1996

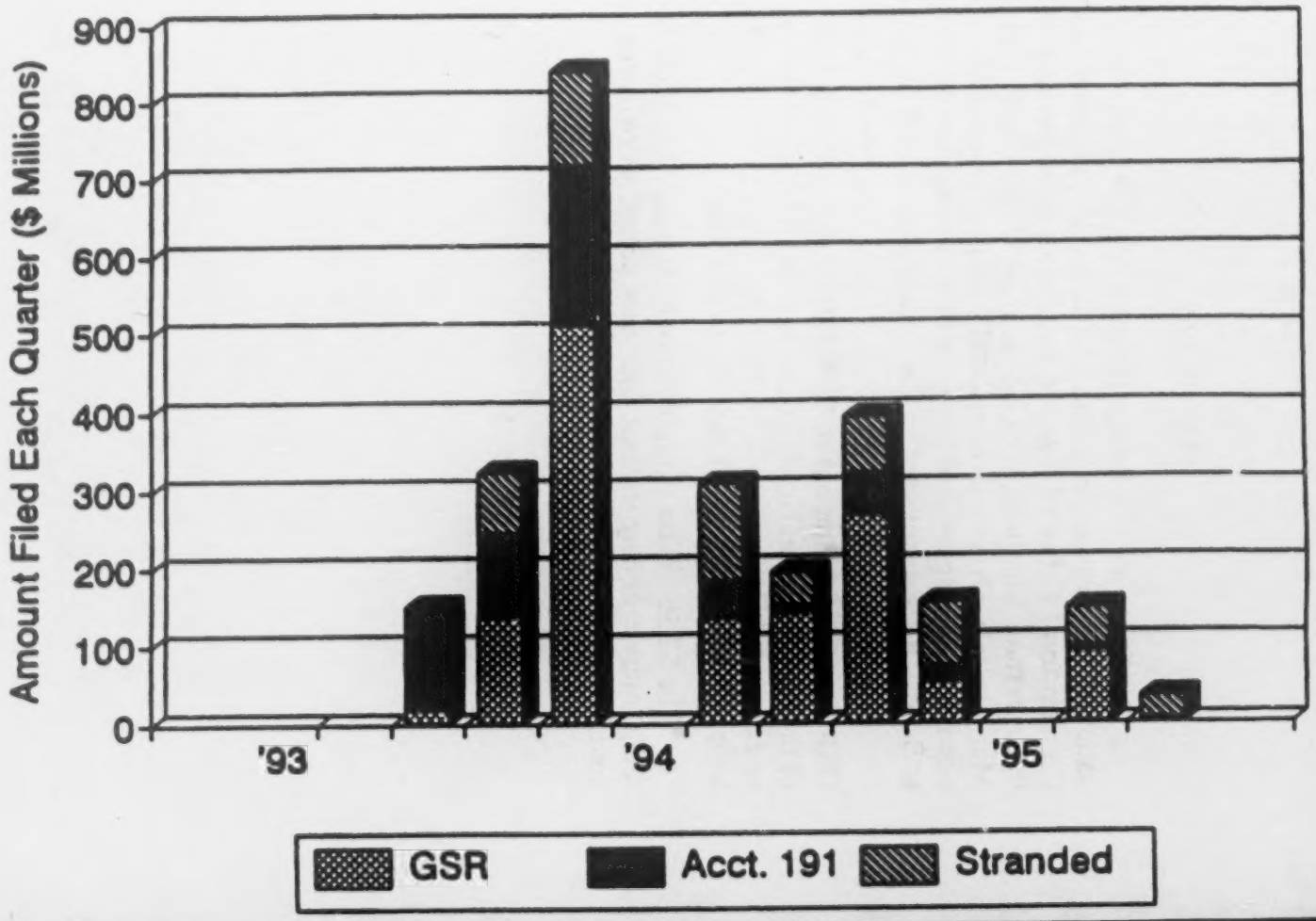
May 10, 1995

The following is a listing of Order No. 636 transition cost data that has been collected and tabulated by personnel in the Commission's Office of Pipeline Regulation from public filings by interstate pipelines seeking to recover such costs, as of May 10, 1995. Graphs showing total transition costs and transition costs by category filed for by calendar quarter are presented at B-7-B-10. Costs rejected by the Commission are not included.

Order No. 636 transition costs amount to $2.56 billion. GSR costs, which amount to $1,355,028,056, constitute 53.00% of the total; Account No. 191 Costs makeup 23.40% of the total; and Stranded Costs account for the remaining 23.60%. Pipelines have yet to file to recover new facilities costs.

The $2.56 billion is principal only. It does not reflect pre-filing interest or any interest that may accrue as balances are amortized.

Order No. 636 Costs by Quarter



No. 95-1758

SUPREME COURT OF THE UNITED STATES

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, AND JER PARTNERSHIP,

Respondents.

AFFIDAVIT OF FLOYD TRUJILLO

County of Denver
State of Colorado } SS

AFFIDAVIT OF FLOYD TRUJILLO

FLOYD TRUJILLO, having been duly sworn, deposes and states:

(1) My name is Floyd Trujillo. I am above the age of twenty-one and competent to make this affidavit. I have personal knowledge of the facts set forth herein.

(2) I am Production Revenue Manager of Evergreen Operating Corporation ("Evergreen").

(3) Evergreen is the operator of the Bonny Field, Yuma County, Colorado. Evergreen is also the "Sellers' Representative" of Talus Properties Limited Partnership, Prima Oil Gas Company and John P. Lockridge (collectively "Talus, *et al.*") in connection with their sale of gas from the Bonny Field to Williams Natural Gas Company ("WNG") under the contract at issue in this case (the "Talus Contract").

(4) My responsibilities include maintaining records of the volume of gas sold by Talus, *et al.,* to WNG and the amount paid by WNG to Talus, *et al.,* for gas sold under the Talus Contract.

(5) In calendar year 1995, Talus, *et al.,* sold approximately 1,368,854 Mcf of natural gas to WNG under the Talus Contract. WNG paid Talus, *et al.,* a wellhead value of approximately $9,665,374 for natural gas purchased by WNG under the Talus Contract in 1995.

The foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Floyd Trujillo

Floyd Trujillo

Subscribed and sworn to before me, a notary public, this 6th day of May 1996.

/s/ Garnet P. Schultz

Notary Public

My Commission expires:

May 26, 1997

No. 95-1758

SUPREME COURT OF THE UNITED STATES

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, AND JER PARTNERSHIP,

Respondents.

AFFIDAVIT OF JOEL ROTHMAN

County of Denver
State of Colorado } SS

AFFIDAVIT OF JOEL ROTHMAN

JOEL ROTHMAN, having been duly sworn, deposes and states:

(1) My name is Joel Rothman. I am above the age of twenty-one and competent to make this affidavit. I have personal knowledge of the facts set forth herein.

(2) Until April 1995, I was the President of The Bank of Greeley in Greeley, Colorado, and am familiar with financial statements and accounting principles.

(3) Since 1982, I have maintained the production and income records of Yuma County Oil Company and of JER Partnership.

(4) In calendar year 1995, Yuma County Oil Company ("Yuma") sold approximately 187,016 Mcf of natural gas to Williams natural Gas Company ("WNG") under the contract at issue in this case (the "Yuma Contract"). WNG paid Yuma approximately $1,103,836 for natural gas purchased by WNG under the Yuma Contract in 1995.

(5) In calendar year 1995, JER Partnership ("JER") sold approximately 1329,622 Mcf of natural gas to WNG under the contract at issue in this case (the "JER Contract"). WNG paid JER approximately $824,120 for natural gas purchased by WNG under the JER Contract in 1995.

The foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Joel Rothman

Joel Rothman

Subscribed and sworn to before me, a notary public, this 3rd day of May 1996.

/s/ Garnet P. Schultz

Notary Public

My Commission expires:

May 26, 1997